

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICTOR ENRIQUEZ-FRANCO

Claimant

VS.

**BORDNER ROOFING CO. and
JOSE LARA ROOFING**

Respondents

AND

**MIDWEST EMPLOYERS CASUALTY CO.
and INSURANCE COMPANY UNKNOWN**

Insurance Carrier

Docket No. 1,041,166

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 18, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. Brian J. Fowler, of Kansas City, Missouri, appeared for respondent Bordner Roofing Co. and its insurance carrier Midwest Employers Casualty Co. (respondent). There was no appearance by respondent, Jose Lara Roofing.

The Administrative Law Judge (ALJ) found that claimant failed to prove by a preponderance of credible evidence that claimant was employed by a contract of employment completed in Kansas. Accordingly, the ALJ found he did not have jurisdiction over this claim.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 10, 2008, Preliminary Hearing and the exhibits; the transcript of the June 17, 2009, Preliminary Hearing; the transcript of the evidentiary deposition of Julio Lara taken January 16, 2009; and the transcripts of the evidentiary depositions taken of Erik Lara on February 19, 2009, and on February 27, 2009, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that the uncontroverted facts prove that Erik Lara and/or Julio Lara acted as the agent of Jose Lara in forming a contract of employment between claimant and Jose Lara Roofing. Claimant contends that since the last act of the employment contract occurred when Erik and Julio left Jose's home in Kansas and took claimant to the job site, claimant's contract for hire was established in Kansas. Claimant argues, therefore, that there is jurisdiction for this claim under the Kansas Workers Compensation Act.

Respondent requests that the ALJ's Order be affirmed. Respondent argues that the ALJ and Board previously found that Jose Lara had not made claimant an offer of employment. Respondent contends there is no evidence to support claimant's argument that Jose Lara's son, Erik, and/or nephew, Julio, were agents of Jose Lara or otherwise had authority to or ever did hire claimant. Further, respondent requests an award for costs and fees for defending this issue for a second time.

The issues for the Board's review are:

- (1) Were Erik Lara and/or Julio Lara agents of Jose Lara so as to be able to form a contract of employment with claimant for Jose Lara Roofing?
- (2) If so, did either Erik Lara or Julio Lara hire claimant to work for Jose Lara Roofing?
- (3) If so, did a contract of hire occur in Kansas?
- (4) Is respondent entitled to costs and fees for defending this issue a second time?

FINDINGS OF FACT

The issue of whether claimant's alleged contract of employment with Jose Lara Roofing was formed in Kansas was before this Board previously. The findings of facts set out in the Board's Order filed November 21, 2008, are incorporated herein as though fully set out.¹ In the Order entered in that appeal, the Board found that claimant failed to prove he entered into an employment contract with Jose Lara in the state of Kansas. Further, the Board found that the evidence did not establish that Mr. Lara's sons and nephew were his agents. Accordingly, the Board found that jurisdiction over this claim of a Missouri accident does not lie in Kansas.

At the preliminary hearing held on June 17, 2009, claimant's attorney stated:

¹ *Enriquez-Franco v. Bordner Roofing Co./Jose Lara Roofing*, No. 1,041,166, 2008 WL 5122325 (Kan. WCAB Nov. 21, 2008).

But Mr. Jose Lara got up and testified there was never a phone call. There was never a conversation with the claimant. There was never an invitation to his house. There was never a contract for him to work for the company. So if that's true, and we believe it is, then that leaves us with the agency. That's the only basis for the employment to have taken place.²

Claimant has since taken the depositions of Julio Lara and Erik Lara, Jose Lara's nephew and son respectively, in order to prove that one or both of them acted as an agent of Jose Lara Roofing. Claimant contends the final step necessary for the formation of the employment contract occurred when Julio and Erik Lara took him from Jose's home in Kansas to the job site in Missouri on the day of his accident.

Julio Lara said that he is the nephew of Jose Lara and lives in Jose's house. He has worked for Jose Lara Roofing for about five years. He said that on a working day, Jose lets him know whether he is going to work that day and, if he will be working, where the job site will be. If Jose is not at home, he will call his house and whoever answers the phone will take that information from him. Along with Julio, Jose's sons, Erik and Moises Lara, live in the house.

Julio Lara testified that claimant had lived in Jose's house about a week and a half before his accident. On the day before the accident, Erik, Moises, Julio and claimant traveled to a job site, but they did not work that day because it was snowing. The next day, after speaking with Jose, he, together with Erik, Moises and claimant, got into a truck and proceeded first to a place where they loaded supplies into the truck and then on to the job site. Julio testified that he did not invite claimant to go to work. Julio was the last person in the truck, and claimant was already there. After they arrived at the job site, Julio worked alone and did not see any of the others working on the roof.

Erik Lara testified that when his father, Jose Lara, is not at home, he will speak to him by telephone, and his father will tell him whether there will be any work that day. On February 12, 2008, Erik spoke with his father by phone, and Jose told him to go to Bordner Roofing Company's (Bordner) warehouse. Erik then told Moises and Julio where they would be going. Erik said that his brother, Moises, cousin Julio, and claimant got in the truck with him. Although he had not asked claimant to go with them, claimant voluntarily got into the truck. Neither Erik, Moises nor Julio asked claimant anything about getting on the truck. Erik, Moises, Julio and claimant went to the Bordner's warehouse. According to Erik, he, Moises and Julio loaded materials into the truck, and claimant watched from inside the truck. They then drove to the job site. But because it was snowing, Erik decided that the crew would not be able to work that day. The next day, February 13, claimant again got into the truck when they left for the job site without anyone telling him to do so.

² P.H. Trans. (June 17, 2009) at 5-6.

Erik testified that claimant said that Jose had instructed him to get on the truck and help them work, so no one asked him to get out of the truck.

After the crew arrived at the job site, Erik, Moises and Julio unloaded materials from the truck to the roof. Eventually, all four of them, including claimant, were on the roof. Claimant was putting shingles on the roof. At some point, someone yelled that claimant was on the ground. Erik drove him to the doctor and then to a hospital. That evening, Erik called his father and reported to him what had happened.

PRINCIPLES OF LAW

The issue in this appeal is whether either Erik Lara or Julio Lara acted as the agent of Jose Lara and, in so doing established a contract of employment between claimant and Jose Lara Roofing, and, if so, whether that contract was formed in the state of Kansas.

The Kansas Supreme Court has held that an express contract is not required to prove a contract of employment. Instead, the conduct of the parties is sufficient to disclose an agreement between an employer and employee. The Kansas Supreme Court in *Casebeer*³ stated, in part:

Respondent and his carrier also argue that there was no contract of employment as to claimant's work as a welder and laborer.

In determining the actual relationship of parties under the Workmen's Compensation Act courts do not regard a single fact as conclusive but will look at all the facts and circumstances involved in a particular case. Our Workmen's Compensation Act does not require an express contract to establish its existence, the conduct of the parties being sufficient to disclose an agreement. [Citations omitted.]

A contract is "made" when and where the last act necessary for its formation is done.⁴

While an express contract may create an agency relationship, conduct implying an agency relationship serves just as well. Express agency exists when the principal expressly authorizes the agent to do delegable acts. Implied agency may exist if it appears from the parties' words, conduct, or other circumstances that the principal intended to give the agent authority to act.

³ *Casebeer v. Casebeer*, 199 Kan. 806, 810-11, 433 P.2d 399 (1967).

⁴ *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 79, 530 P.2d 1222 (1975).

Under Kansas law, an agency relationship may exist notwithstanding either a denial of agency by the alleged principal or a lack of mutual understanding of agency between the parties.⁵

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

Initially, claimant did not allege that he was implicitly hired by Erik or Julio. Rather, claimant testified that he was expressly hired by Jose. Now claimant alleges his contract of employment occurred because neither Erik nor Julio told him not to get in the truck or not to work. Claimant acknowledges that neither Erik nor Julio asked claimant to work. Moreover, there is no evidence that either Erik or Julio had the express or implied authority to act as an agent for either respondent in hiring matters. To the contrary, both Erik and Julio testified that they received their instructions daily from Jose and were simply employees of Jose Lara Roofing. Jose Lara testified that only he did the hiring for Jose Lara Roofing. Claimant's voluntary actions of getting on the work truck and performing tasks at the work site were unilateral and did not create a contract of employment. There was no meeting of the minds and no employment contract between claimant and either Erik or Julio as agents of Jose Lara Roofing.

Even if Jose's son, Erik, had express or implied authority to perform certain acts in Jose's absence, such as supervising the work performed by the crew, there is no evidence that he had authority to hire and fire crew members. Moreover, neither the principal, Jose, nor the alleged agent, Erik, represented or induced claimant to believe that such authority had been conferred upon Erik. Furthermore, claimant did not testify that he believed he had been hired by Erik or Julio.

Respondent argues that the costs of this preliminary hearing should be assessed against claimant because the ALJ had already ruled upon claimant's allegations and that determination was affirmed by one member of the Board. Respondent is correct that both preliminary hearings and appeals have been on the issue of whether there was a Kansas contract of hire. However, at the first preliminary hearing, claimant was alleging he was

⁵ *In re Tax Appeal of Scholastic Book Clubs, Inc.*, 260 Kan. 528, Syl. ¶¶ 7 & 8, 920 P.2d 947 (1996).

⁶ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2008 Supp. 44-555c(k).

hired by Jose Lara, whereas at the second preliminary hearing and in this appeal, claimant is alleging he was subsequently hired by claimant's son or nephew. Despite the claimant's failure to meet his burden of proof on this issue, this Board Member does not believe an assessment of costs against claimant is warranted.

CONCLUSION

(1-3) Claimant has failed to establish Kansas jurisdiction for his alleged work-related accident.

(4) Claimant is not liable for the costs of this action.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 18, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier
Jose Lara, Jose Lara Roofing, 302 S. Boeke St., Kansas City, KS, 66101-3723
Kenneth J. Hursh, Administrative Law Judge